Public Prosecutor v Manimaran a/l Manickam

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05–358 OF 2010
RAUS SHARIF FCJ, ABU SAMAH AND SULONG MATJERAIE JJCA
30 SEPTEMBER 2011

Criminal Procedure — Plea of guilty — Plea bargaining — Principles applicable to plea bargaining — Whether accused pleaded guilty as consequence of plea bargaining — Whether plea bargaining proved

Criminal Procedure — Sentence — Adequacy of sentence — Whether sufficient regard given to public interest — Whether accused pleaded guilty as consequence of plea bargaining — Whether plea bargaining proved — Whether appellate intervention warranted

The respondent was produced before the High Court to face a charge of trafficking dangerous drugs ie 404g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') which carries the death penalty. On the hearing date, the learned deputy public prosecutor ('DPP') informed the High Court that the prosecution was making an offer to the respondent to amend the charge from trafficking to that of possession under s 6 of the DDA which is punishable under s 39A(2). The respondent pleaded guilty to the amended charge. After hearing the plea in mitigation, the learned trial judge sentenced the respondent to six years imprisonment and ten strokes of whipping. The public prosecutor appealed against the sentence on the grounds that it was manifestly inadequate. Learned defence counsel submitted that the sentence imposed by the High Court was a result of a plea bargaining between the defence and prosecution. According to him, the respondent had pleaded guilty to the amended charge on the understanding that the sentence imposed by the court would be the sentence earlier agreed between the prosecution and the defence. The learned DPP replied that there was no such agreement between the prosecution and the defence. According to learned DPP, the offer by the prosecution was limited to a reduction of the charge from trafficking to that of possession, on the condition that the respondent will plead guilty to the amended charge.

Held, setting aside conviction and sentence and remitting case to High Court for retrial:

(1) The time has come for our courts to depart from the decision of *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27 in prohibiting the courts from

being involved in plea bargaining. The presiding judge or the magistrate should be free to indicate the maximum sentence he or she is minded to impose where the accused person or his counsel sought an indication of his current view of the sentence which would be imposed on the accused (see para 21).

(2) The request for plea bargaining must come from the accused person. The application must be made by the accused person to the public prosecutor. If an application is made to the court, the court must forward the same to the public prosecutor. The application may also be made by counsel representing the accused person. In such situation, the counsel must get a written authority signed by his client that he, the client, wishes to plea bargain on the sentence. It is the counsel's duty to ensure that his client fully appreciates that he should not plead guilty unless he is guilty of the offence (see para 21(a)).

(3) Once there is a request from the defence, the prosecution must be quick to react. Both must reach an agreement on the sentence ie the minimum and the maximum sentence that the prosecution and defence can accept as the punishment. The agreement is preferably to be in writing. Once there is an agreement reached between the defence and the prosecution, it must be placed before the court. If the court agrees, the judge or magistrate should indicate his or her agreement to the parties. And the sentence imposed must be within the range agreed to between the parties (see para 21(b)).

(4) If the court disagrees with the sentence proposed by the prosecution and the defence, it must accordingly inform the parties and indicate the sentence it would be imposing. It is up to the parties to decide on the next move. If there is no agreement, the case should go for trial. In whatever circumstances, the judge retains the unfettered discretion whether to agree with the sentence to be imposed or otherwise (see para 21(c)).

(5) The process of plea bargaining must be done transparently. It must be recorded and the notes will form as part of the notes of proceedings (see para 21(d)).

(6) There was nothing in the notes of proceedings that indicated that a plea bargaining process had taken place between the prosecution and the defence on the sentence. Further, the prosecution was denying that there was in fact a plea bargaining on the sentence. Hence, the court could not sanction the so called plea bargaining in respect of the sentence that was alleged to have taken place before the learned trial judge (see paras 22 & 25).

(7) The sentence imposed on the respondent was manifestly inadequate. Public interest called for a deterrent sentence in drugs related cases. However, since there was a dispute as to the circumstances that led to the

respondent pleading guilty to the amended charge, the court was in doubt as to whether the plea of guilty by the respondent was an unqualified plea. Hence, the benefit of the doubt was given to the respondent. The conviction and sentence was set aside and the case was remitted before the High Court for a retrial before another judge on the original charge (see paras 26 & 29–30).

[Bahasa Malaysia summary

Responden telah dibawa ke hadapan Mahkamah Tinggi untuk berdepan dengan tuduhan mengedar dadah berbahaya iaitu 404g kanabis, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang mana membawa hukuman mati. Pada tarikh perbicaraan, timbalan pendakwaraya yang bijaksana ('TPR') memberitahu Mahkamah Tinggi bahawa pihak pendakwaan sedang membuat tawaran kepada responden untuk meminda tuduhan daripada pengedaran kepada milikan di bawah s 6 ADB yang boleh dihukum di bawah s 39A(2). Responden mengaku bersalah terhadap tuduhan yang dipinda tersebut. Selepas mendengar rayuan meringankan hukuman, hakim bicara yang bijaksana menjatuhkan hukuman enam tahun penjara dan sepuluh kali sebatan terhadap responden. Pendakwaraya telah membuat rayuan terhadap hukuman atas alasan bahawa ia dengan jelas tidak mencukupi. Peguambela yang bijaksana berhujah bahawa hukuman yang dikenakan oleh Mahkamah Tinggi adalah hasil daripada persetujuan akuan di antara pihak pembelaan dan pendakwaan. Menurutnya, responden telah mengaku salah terhadap tuduhan yang dipinda berdasarkan pemahaman bahawa hukuman yang akan dikenakan oleh mahkamah adalah hukuman yang sebelumnya dipersetujui di antara pihak pendakwaan dan pembelaan. TPR yang bijaksana membalas bahawa tidak terdapat sebarang persetujuan di antara pihak pendakwaan dan pembelaan. Menurut TPR yang bijaksana, tawaran yang dilakukan oleh pihak pendakwaan hanyalah terhad kepada pengurangan tuduhan daripada pengedaran kepada milikan, atas syarat bahawa responden mengaku bersalah terhadap tuduhan yang dipinda.

Diputuskan:

(1) Sudah tiba masanya bagi mahkamah di Malaysia untuk menyimpang daripada keputusan *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27 dalam menghindar mahkamah daripada terlibat dalam persetujuan akuan. Hakim atau majistret yang membicarakan seharusnya bebas untuk mengetengahkan hukuman maksimum yang ingin dikenakan apabila tertuduh atau peguamnya meminta petunjuk tentang pandangannya tentang hukuman yang harus dikenakan terhadap tertuduh (lihat perenggan 21).

(2) Permohonan untuk persetujuan akuan hendaklah datang daripada tertuduh. Permohonan hendaklah dilakukan oleh tertuduh kepada pendakwaraya. Sekiranya permohonan dibuat kepada mahkamah,

mahkamah akan mengajukan perkara yang sama kepada pendakwaraya. Permohonan juga boleh dibuat oleh peguam yang mewakili tertuduh. Dalam situasi ini, peguam tersebut hendaklah mendapatkan kebenaran bertulis yang ditandatangani oleh anak guamnya bahawa dia, anak guam, berhasrat untuk membuat persetujuan akuan terhadap hukuman. Adalah menjadi tugas peguam tersebut untuk memastikan anak guamnya benar-benar memahami bahawa dia tidak seharusnya mengaku salah melainkan dia bersalah terhadap kesalahan tersebut (lihat perenggan 21(a)).

(3) Setelah terdapat permintaan daripada pihak pembelaan, pihak pendakwaan hendaklah pantas untuk bertindak. Kedua-duanya hendaklah mencapai persetujuan terhadap hukuman iaitu hukuman minimum dan maksimum yang mana boleh diterima oleh pihak pendakwaan dan pembelaan sebagai hukuman. Persetujuan tersebut sebaik-baiknya adalah dalam bentuk bertulis. Setelah persetujuan tercapai di antara pihak pembelaan dan pendakwaan, ia hendaklah dikemukakan di mahkamah. Sekiranya mahkamah bersetuju, hakim atau majistret seharusnya mengetengahkan persetujuannya kepada pihak-pihak. Dan hukuman yang dikenakan hendaklah dalam lingkungan yang dipersetujui di antara pihak-pihak (lihat perenggan 21(b)).

(4) Sekiranya mahkamah tidak bersetuju dengan hukuman yang dicadangkan oleh pihak pendakwaan dan pembelaan, ia hendaklah memaklumkan pihak-pihak dan mengetengahkan hukuman yang akan dikenakan. Terpulang kepada pihak-pihak untuk memutuskan langkah yang seterusnya. Sekiranya tidak terdapat persetujuan, kes akan dibawa untuk perbicaraan. Dalam keadaan apa sekalipun, hakim mempunyai budi bicara yang luas sama ada untuk bersetuju dengan hukuman yang dikenakan atau sebaliknya (lihat perenggan 21(c)).

(5) Proses persetujuan akuan hendaklah dijalankan dengan telus. Ia hendaklah dirakam dan nota-nota akan dijadikan sebahagian daripada nota-nota prosiding (lihat perenggan 21(d)).

(6) Tiada apa-apa di dalam nota-nota prosiding yang menunjukkan bahawa proses persetujuan akuan telah berlaku di antara pihak pendakwaan dan pembelaan terhadap hukuman tersebut. Malahan, pihak pendakwaan telah menafikan bahawa sememangnya terdapat persetujuan akuan terhadap hukuman tersebut. Justeru, mahkamah tidak seharusnya mensanksi persetujuan akuan tersebut berkenaan dengan hukuman yang didakwa telah berlaku di hadapan hakim bicara yang bijaksana (lihat perenggan 22 & 25).

(7) Hukuman yang dikenakan terhadap responden jelas tidak mencukupi. Kepentingan awam memerlukan hukuman bersifat mencegah dalam kes

berkenaan dengan dadah. Walau bagaimanapun, memandangkan terdapat pertikaian tentang keadaan yang membawa responden untuk mengaku bersalah terhadap tuduhan yang dipinda, mahkamah ragu-ragu sama ada akuan bersalah oleh responden merupakan akuan tanpa syarat. Oleh itu, faedah keraguan telah diberikan kepada responden. Sabitan dan hukuman tersebut diketepikan dan kes dikembalikan di Mahkamah Tinggi untuk perbicaraan semula di hadapan hakim yang lain terhadap tuduhan asal (lihat perenggan 26 & 29–30).]

Notes:

For a case on plea bargaining, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2795.

For cases on adequancy of sentence, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3499–3534.

Cases referred to

Haryadi bin Dadeh v PP [2000] 4 MLJ 71; [2000] 3 CLJ 553, FC (refd)

Mckinnon v Government of the United States of America [2008] 1 WLR 1739 (refd)

Mohd Radzi bin Abu Bakar v PP [2006] 1 CLJ 457, FC (refd)

New Tuck Shen v PP [1982] 1 MLJ 27 (overd)

R v Goodyear [2005] 3 All ER 117, CA (refd)

R v Turner [1970] 2 All ER 281, CA (refd)

Subramaniam a/l Arumugam v PP [2002] 2 MLJ 193, FC (refd)

Legislation referred to

Criminal Procedure Code s 376
Dangerous Drugs Act 1952 ss 6, 39A(2), 39B(1)(a),
Prevention of Corruption Act 1961 s 4(b)

Appeal from: Criminal Appeal No 45A-9 of 2010 (High Court, Shah Alam)

Saiful Edris bin Zainuddin (PG Cyril with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

Rajpal Singh (Amrit Pal Singh and K Theivaendran with him) (Rajpal & Associates) for the respondent.

Raus Sharif FCJ (judgement of the court):

INTRODUCTION

[1] This is an appeal by the public prosecutor against sentence. The respondent was sentenced by the High Court Shah Alam for six years imprisonment and ten strokes of whipping after he pleaded guilty to an

amended charge of being in possession of 404g of cannabis, an offence under s 6 of the Dangerous Drugs Act 1952 ('DDA') and punishable under s 39A(2) of the DDA.

[2] The penalty for committing an offence under s 6 when read with s 39A(2) of the DDA is 'imprisonment for life or a term which shall not be less than five years', and 'shall also be punished with whipping of not less than ten strokes'.

[3] We heard the appeal on 19 May 2011. After hearing the parties, we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same.

FACTS

[4] Briefly the facts leading to this appeal are these. On 4 June 2010, the respondent was produced before the High Court Shah Alam to face a charge of trafficking dangerous drugs ie 404g of cannabis, an offence under s 39B(1)(a) of the DDA which carries the death penalty. A hearing date was fixed on 1 September 2010.

[5] On the hearing date, the learned deputy public prosecutor ('DPP') informed the High Court that the prosecution was making an offer to the respondent to amend the charge from trafficking to that of possession. Learned counsel for the respondent sought for the case to be stood down to enable him to seek instructions from his client. The case was stood down to 11.30am on the same day.

[6] When the case was called up again, the learned DPP tendered the amended charge. The charge reads:

> Bahawa kamu pada 10 Ogos 2009 jam lebih kurang 3.30 petang bertempat di alamat No. C-9-23, No. 2, Rumah Pangsa, Rampai Idaman, Jalan PJU 10/9, Prima Damansara, Sungai Buloh di dalam Daerah Petaling, di dalam Negeri Selangor Darul Ehsan, telah memiliki dadah berbahaya iaitu cannabis seberat 404 gram dan dengan itu kamu telah melakukan kesalahan di bawah seksyen 6 Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39A(2) Akta yang sama.

[7] The respondent pleaded guilty to the amended charge. On request of learned counsel, the case was adjourned to the next day to enable him to prepare for the respondent's plea in mitigation.

[8] On 2 September 2010, after hearing learned counsel submission, on the plea in mitigation and the reply from the learned DPP, the learned trial judge

sentenced the respondent to six years imprisonment and ten strokes of whipping.

SUBMISSIONS

[9] Before us, the learned DPP, En Saiful Edris bin Zainuddin (En PG Cyril with him) submitted that the sentence passed by the High Court judge was manifestly inadequate. He argued that a heavier custodial sentence ought to be meted out against respondent. The Federal Court cases of *Public Prosecutor v Mohd Radzi Abu Bakar* [2006] 1 CLJ 457, *Haryadi bin Dadeh v Public Prosecutor* [2004] 4 MLJ 71; [2000] 3 CLJ 553 and *Subramaniam a/l Arumugam v Public Prosecutor* [2002] 2 MLJ 193 were cited to support his arguments.

[10] Learned defence counsel, En Rajpal Singh (En Amrit Pal Singh and En K Theivaderan with him) submitted that the public prosecutor should not have appealed in this case. He contended that the sentence imposed by the High Court was a result of a plea bargaining between the defence and prosecution. According to him, the respondent had pleaded guilty to the amended charge on the understanding that the sentence imposed by the court would be the sentence earlier agreed between the prosecution and the defence. He urged us to uphold the sentence imposed against the respondent.

[11] The learned DPP, in his reply, submitted that there was no such agreement between the prosecution and the defence. According to the learned DPP, the offer by the prosecution was limited to a reduction of the charge from trafficking to that of possession, on the condition that the respondent will plead guilty to the amended charge.

DECISION

Plea bargaining

[12] In Malaysia, the issue of plea bargaining was discussed in the case of *New Tuck Shen v Public Prosecutor* [1982] 1 MLJ 27. In that case, New Tuck Shen ('appellant') was charged in the sessions court with an offence under s 4(b) of the Prevention of Corruption Act 1961. It was alleged by the appellant's counsel that an understanding had been reached between him and the learned DPP wherefore, in return for the appellant pleading guilty to the charge, the learned DPP would leave the matter of sentence to the court. The appellant, in consequence, pleaded guilty to the charge, admitted the facts and was convicted by the court. The defence counsel in his plea in mitigation requested for non-custodial sentence. However, the learned DPP, in his reply, pressed for a deterrent sentence. The appellant's counsel protested the learned DPP's

conduct and applied to retract the appellant's plea. The learned President of the session court, stood firm in his acceptance of the plea, and sentenced the appellant to six months imprisonment.

[13] The High Court judge, Wan Yahaya J (as he then was) in dismissing the appellant's appeal quoted and relied heavily on the English case of *R v Turner* [1970] 2 All ER 281. In *R v Turner*, the English Court of Appeal held that a judge should firstly never give an indication as to the sentence that he is minded to impose, and secondly, he is never bound to follow any private bargaining between the prosecution and the defence in regard to sentence.

[14] Wan Yahaya J (as he then was) citing *R v Turner*, similarly said:

> This court does not consider it bound by the private bargaining between the prosecution and the defence in respect of which bargaining it is not a party and in which it has been judicially prohibited to participate.

[15] However, over the years, public policy has shifted towards accepting plea bargaining. In *R v Goodyear* [2005] 3 All ER 117, the English Court of Appeal decided differently from *R v Turner*. A five men bench, presided by Lord Woolf, set up specifically to decide on plea bargaining said:

> (1) *The rule of practice that a judge should never indicate the sentence which he is minded to impose* (subject to the exception that it is permissible for him to say that the defendant pleads guilty or not guilty the sentence will or will not take a particular form) *no longer need be followed in circumstances where a defendant personally instructs his counsel to seek an indication from the judge* of his current view of the maximum sentences which would be imposed on the defendant. (Emphasis added.)

[16] The departure from *R v Turner* was cited with approval in the House of Lords in *Mckinnon v Government of the United States of America* [2008] 1 WLR 1739. The House of Lords agreed with *R v Goodyear*'s reasoning by stating:

> … essentially that a judge may respond to defendant's request that he be told the maximum sentence that it would be imposed on a plea of guilty but is not to volunteer such information unasked …

[17] Thus, the position in England as it now stands is that a judge is free to indicate a sentence to a defendant who asks or instruct his counsel to ask as to the likely sentence to be imposed, if he pleaded guilty to the charge. The courts are no longer prohibited in participating in plea bargaining between the prosecution and the defence in regard to sentence.

[18] In Malaysia, public policy on plea bargaining has also shifted towards

the same direction. The recent amendments of the Criminal Procedure Code is a clear intention of Parliament in respect of plea bargaining. The new ss 172C to 172F of the Criminal Procedure Code (Amendment) Act 2010 provide as follows:

172C

(1) An accused charged with an offence may make an application for plea bargaining in the Court in which the offence is to be tried.

(2) The application under subsection (1) shall be in Form 28A of the Second Schedule and shall contain —

(a) A brief description of the offence that the accused is charged with;

(b) A declaration by the accused stating that the application is voluntarily made by him after understanding the nature and extent of the punishment provided under the law for the offence that the accused is charged with; and

(c) Information as to whether the plea bargaining applied for is in respect of the sentence or the charge for the offence that the accused is charged with.

(3) Upon receiving an application made under subsection (1), the Court shall issue a notice in writing to the Public Prosecutor and to the accused to appear before the Court on a date fixed for the hearing of the application.

(4) When the Public Prosecutor and the accused appear on the dated fixed for the hearing of the application under subsection (3), the Court shall examine the accused in camera —

(a) where the accused is unrepresented, in the absence of the Public Prosecutor; or

(b) where the accused is represented by an advocate, in the presence of his advocate and the Public Prosecutor,

as to whether the accused has made the application voluntarily.

(5) Upon the Court being satisfied that the accused has made the application voluntarily, the Public Prosecutor and the accused shall proceed to mutually agree upon a satisfactory disposition of the case.

(6) If the Court is of the opinion that the application is made involuntarily by the accused, the Court shall dismiss the application and the case shall proceed before another Court in accordance with the provisions of the Code.

(7) Where the satisfactory disposition of the case has been agreed upon by the accused and the Public Prosecutor, the satisfactory disposition shall be put into writing and signed by the accused, his advocate if the accused is represented, and the Public Prosecutor, and the Court shall give effect to the satisfactory disposition as agreed upon by the accused and the Public Prosecutor.

(8) In the event that no satisfactory disposition has been agreed upon by the accused and the Public Prosecutor under this section, the Court shall record such observation and the case shall proceed before another Court in accordance with the provisions of the Code.

(9) In working out a satisfactory disposition of the case under subsection (5), it is the duty of the Court to ensure that the plea bargaining process is completed voluntarily by the parties participating in the plea bargaining process.

[19] The Amendment Act 2010, though had been passed by the Parliament, had not been put into force yet. But the clear intention was to formalise the process of plea bargaining. However, even before the introduction of the above provisions, plea bargaining between the defence and prosecution frequently takes place in our courts. But they are normally confined to instances of the accused pleading guilty to lesser charges or to one of several charges in exchange for withdrawal of the rest.

[20] There are also instances where the accused person pleads guilty to the charge in exchange of the prosecution not pressing for deterrent sentence. It is a common occurrence that in such situation both the prosecution and the defence will approach the presiding judge or the magistrate. More often than not the presiding judge or magistrate will indicate the range of sentence that he or she will impose. This was what Wan Yahaya J in *New Tuck Shen v Public Prosecutor* wanted to avoid ie the court should never give an indication as to the sentence that it is minded to impose.

[21] However, we are now of the view that the time has come for our courts to depart from the decision of *New Tuck Shen v Public Prosecutor* in prohibiting the courts from being involved in plea bargaining. The presiding judge or the magistrate should be free to indicate the maximum sentence he or she is minded to impose where the accused person or his counsel sought an indication of his current view of the sentence which would be imposed on the accused. But proper guidelines must be followed. We are proposing the following guidelines:

(a) The request for plea bargaining must come from the accused person. The application must be made by the accused person to the public prosecutor. If an application is made to the court, the court must forward the same to the public prosecutor. The application may also be made by counsel representing the accused person. In such situation, counsel must get a written authority signed by his client that he, the client, wishes to plea bargain on the sentence. And it is counsel's duty to ensure that his client fully appreciates that he should not plead guilty unless he is guilty of the offence.

(b) Once there is a request from the defence, the prosecution must be quick to react. Both must reach an agreement on the sentence ie the minimum and the maximum sentence that the prosecution and defence can accept as the punishment. The agreement is preferably to be in writing. Once there is an agreement reached between the defence and the prosecution,

it must be placed before the court. If the court agrees, the judge or magistrate should indicate his or her agreement to the parties. And the sentence imposed must be within the range agreed to between the parties.

(c) However, if the court disagrees with the sentence proposed by the prosecution and the defence, it must accordingly inform the parties and indicate the sentence it would be imposing. It is up to the parties to decide on the next move. If there is no agreement, the case should go for trial. The agreement of the court is vital because in whatever circumstances, the judge retain the unfettered discretion whether to agree with the sentence to be imposed or otherwise.

(d) The process of plea bargaining must be done transparently. It must be recorded and the notes will form as part of the notes of proceedings.

[22] The problem in the present case is that the process of plea bargaining was not recorded. There is nothing in the notes of proceedings that indicate there was in fact a plea bargaining process that took place between the prosecution and the defence on the sentence. What we have is what was said by the learned trial judge in his grounds of judgment which reads:

> Saya juga mengambilkira praktis *plea bargaining* yang dijalankan oleh peguambela dan timbalan pendakwa raya di mana perkara ini telah dimaklumkan kepada mahkamah.

[23] Further, towards the end of the judgment the learned trial judge concluded by stating:

> Akhir sekali saya berpendapat bahawa enam tahun penjara dan sepuluh kali sebatan rotan untuk kes ini adalah selaras dengan *plea bargaining* yang dicapai oleh peguambela dan timbalan pendakwaraya.

[24] It appears from the grounds of judgment of the learned trial judge that the sentence imposed was based on the plea bargaining process between the prosecution and the defence. But it is not known how the process of plea bargaining was done and how the agreement on the sentence was reached between the parties. What makes it worse in this case is that the prosecution is denying that there was in fact a plea bargaining on the sentence.

[25] It is for this reason, we strongly advise the judges and magistrates to record the process of plea bargaining. Judges and magistrates must record exactly what transpires before them in respect of the plea bargaining process. It is unfortunate in this case, that it was not done. As such, and with regret, we could not sanction the so called plea bargaining in respect of the sentence that

was alleged to have taken place before the learned trial judge.

SENTENCE

[26] The question now remains whether we should allow the public prosecutor's appeal. On the facts of this case, we have no hesitation to state that the sentence of six years imprisonment and ten strokes of whipping imposed against the respondent was manifestly inadequate.

[27] It had been said again and again that the public interest called for a deterrent sentence in drugs related cases. The Federal Court cases referred by the learned DPP, is a clear indication of strong concern by our courts in offences relating to possession of dangerous drugs. In *Public Prosecutor v Mohd Radzi Abu Bakar*, the accused was sentenced to 18 years imprisonment and ten strokes of whipping for possession of 342.1g of cannabis. In *Haryadi bin Dadeh v Public Prosecutor*, the accused was sentenced to ten years imprisonment and ten strokes of whipping for possession of 251.60g of cannabis. While in *Subramaniam a/l Arumugam v Public Prosecutor*, the accused was sentenced to 12 years imprisonment and ten strokes of whipping for possession of 236.07g of cannabis. Thus, in the present case, we feel that the sentence of six years imprisonment and ten strokes of whipping for possession of 404g of cannabis is clearly out of step with the sentences imposed by the Federal Court on similar cases.

[28] We would like to take this opportunity to remind the prosecution not to leave this difficult area of sentencing only to the court. The prosecution must assist the court. The DPPs in asking for deterrent sentence must produce authorities to back their argument. They must show the trend of sentencing in similar cases. They must also produce statistics to back their facts as to why the court needs to impose a deterrent sentence.

[29] Back to the issue as to whether we should allow the public prosecutor's appeal. Under normal circumstances, we would have done so. However, in this case, it appears that there is a dispute as to the circumstances that led to the respondent pleading guilty to the amended charge. The respondent is claiming that he had pleaded guilty to the amended charge on the understanding that the sentence imposed by the court would be the sentence earlier agreed between the prosecution and the defence. Such understanding is being disputed by the prosecution. As stated earlier, the problem is, nothing is being recorded by the learned trial judge other than what he had said in his grounds of judgment.

[30] Clearly there is uncertainty whether there was such an understanding between the prosecution and the defence. As such we are in doubt as to whether

the plea of guilty by the respondent was an unqualified plea. We are giving the benefit of the doubt to the respondent.

[31] Thus, in all fairness to the prosecution and the defence, we hereby set aside the conviction and sentence. We make an order that the case be remitted before the High Court in Shah Alam for a retrial before another judge. The retrial is on the original charge without prejudicing the right of the public prosecutor under s 376 of the Criminal Procedure Code.

Conviction and sentence set aside and case remitted to High Court for retrial.

Reported by Kanesh Sundrum